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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

KEVIN DAVID MITNICK

Licensee of Station N6NHG in the
Amateur Radio Service for Renewal
of Station License

KEVIN DAVID MITNICK

For Renewal of Amateur Radio
General Class Operator License

TO: Honorable Richard L. Sippel
Administrative Law Judge

WT Docket No. 01-344

File No. 00000-58498

MOTION TO DISQUALIFY PRESIDING OFFICER

Pursuant to Section 1.245(b) of the Commission's Rules and Regulations, Kevin David Mitnick ("Mitnick"), by his attorney, hereby respectfully requests the ALJ to withdraw from this proceeding on grounds of personal bias. In support thereof, it is alleged:

1. On April 26, 2002, Mitnick filed a Motion to Reschedule Hearing in this case and asked that the date for exchange of exhibits be reset to June 14, 2002. The reason for the requested delay was to accommodate Mitnick meeting a due date, May 31, 2002, for the submission of a manuscript to his book publisher, John Wiley & Sons.

2. On May 6, 2002, however, the ALJ denied the motion. In doing so, he indicated considerable irritation with Mitnick. For example, paragraph 4 of the Memorandum Opinion and Order, reads as follows:

“There is no representation that the imminence of this hearing was explained to the publisher and that the publisher would not agree to an extension of the publisher’s May 31st deadline. Nor is here any representation that it would not be possible to market the book (‘The Art of Deception’) to another publisher who would be more amenable to receiving a manuscript after the hearing. Mr. Mitnick merely represents that the book’s completion ‘provides his only significant source of income.’ Notwithstanding the outstanding Order of the Presiding Judge setting in conjunction with counsel the definitive procedural dates, Mr. Mitnick apparently has been attending to a book manuscript rather than preparing his hearing exhibits. Id. Mr. Mitnick promises that ‘as soon as the manuscript is submitted on May 31, 2002, he intends to devote full time and attention to the preparation of his hearing exhibits.’ The ‘promise’ misses the point.”

Footnote 3 reads as follows:

“There were concerns noted by Mitnick’s counsel about not having received letters of support or return of a phone call made to the client. But in the course of a decision to cancel the admission session of June 11th, nothing was said about a need for more time. It will be assumed that counsel was not aware at that time of his client’s predicament.”

3. Now, it is quite true that Mitnick entered into his book contract in January. Mitnick did not, however, even begin to realize just how much work would be involved in fulfilling the contract, nor did he realize how time consuming that task would be. The ALJ’s suggestion, however, that Mitnick could somehow obtain an extension of his publisher’s deadline or go to another publisher was ridiculous. Anybody who knows anything about publishing knows full well that book contracts are terribly, terribly difficult to get. In this instance, moreover, John Wiley is promoting “The Art of Deception” as its book of the year. See attached advertisement. Attempting

to get an extension would have been futile.

4. Once the manuscript was submitted, Mitnick began rounding up letters of support from people who knew him all over the U.S. A total of six letters have been submitted, but the Enforcement Bureau has made it clear that they will object to the letters on hearsay grounds. Therefore, on May 31, 2002, Mitnick filed a motion to take the testimony of these witnesses by speakerphone. Now, one of the functions of a fair and impartial ALJ is to insure that the defendant receives a fair trial and is given every opportunity to present the exculpatory testimony in his favor. Mitnick would have expected, therefore, that the ALJ would bend over backwards to facilitate speakerphone testimony. On June 7, 2002, however, the ALJ issued a Memorandum Opinion and Order which purports to allow the taking of such testimony, but imposes onerous conditions, requested by the Enforcement Bureau, which really make it impossible to do so. In particular, the ALJ directs that all of the witnesses testifying by speakerphone have a notary public in the room with them or report to a Commission field office where the testimony will be taken. Furthermore, the ALJ requires the report on the speakerphone testimony be submitted no later than 4:00 p.m. on June 14, 2002, and requires that all of the speakerphone testimony must be completed by June 19, 2002. Finally, the ALJ requires that all the witnesses submit copies of their passports or drivers licenses stamped by the notary.

5. Surely, the ALJ knows that it is virtually impossible to contact the Commission field offices by telephone, much less make arrangements for personal visits to the field office. Therefore, as a practical matter, arrangements will have to be made for notaries to go to the office of each witness at an agreed time and place for the taking of testimony. These arrangements will be very complicated indeed. Each witness will have to be contacted to determine his/her schedule.

Each of the witnesses are situated in a different community.¹ Most notaries public these days work for banks or automobile dealers and are not available to leave their places of employment for the purposes of attending testimony.

6. Nevertheless, arrangements of this kind can be made, but they will require many, many hours of work on the part of Mitnick's counsel and Mitnick's counsel is a sole practitioner, who has many other matters, which he is handling and cannot afford to devote his entire work day for the next four days making these arrangements. Surely, the ALJ should understand this.²

7. In another proceeding,³ where this ALJ was reversed on appeal, the ALJ suggested that he had some how "lost". The ALJ remarked:

"MR. SHOOK: Your Honor, may I suggest something? Ordinarily, when we have misrepresentation issues to deal with in the hearing designation order, or charging document, if you will, there is usually at least one, if not more than one statement pointed out. I don't remember reading through this whether there were any particular statements noted as having come from, or having been subscribed to by Ms. James Peterson in some fashion.

If there are any statements in the Order -- and I have just forgotten what they may be, it would seem to me that that is something that -- well, I would like to think at first that it was capable of resolution by motion for summary decision. But it may not be, given that you would want to observe credibility.

THE COURT: Being as how I already tried that and lost any way, I think we are going to have a hearing on this." Tr. 21, lines 6-22.

¹Several are in the Los Angeles area, but the Los Angeles area is a very big place indeed, divided into many communities.

²It would appear that it would be sufficient to merely have each witness reduce his or her testimony to writing and have it notarized. The conditions requested by the Enforcement Bureau and adopted by the ALJ were wholly unnecessary.

³*Family Broadcasting, Inc. v. FCC*, EB Docket No. 01-39.

8. In the same proceeding, the same ALJ expressed concern that the prosecution, i.e., the Enforcement Bureau, did not have sufficient funds to prosecute the defendant licensee. The following exchange took place:

“MR. SHOOK: The second aspect is: Whether or not Ms. James-Peterson is complicit in any of the wrongdoing that the Commission has already determined took place? That is something that we have explored, at least to some extent, previously in the deposition of Ms. James-Peterson; and I anticipate would explore further through the document request that we already have -- perhaps, some interrogatories, perhaps a station inspection.

I cannot say right now whether there will be depositions simply because I do not know whether or not the Bureau budget will allow for it. We may just have to live with what we can come up with by a document request, interrogatories and a station inspection.

THE COURT: Wow, the budget is that tight?

MR. SHOOK: Your Honor, we had to pull teeth to get money for Peninsula. If we have to pull teeth to get money for a case where we have the burden of proof, I can only image how much more difficult it will be when we do not have any burdens.

THE COURT: Well, that --

MR. SHOOK: I am not immediately involved in that problem, but I mean to say that, if a case is -- if you have a critical witness, and the critical witness is going to define which way the case goes and you don't have that witness, you don't have full and complete discovery of that witness whatever it takes, that is a tough way to work -- to walk into court. You are taking a chance --

MR. SHOOK: Your Honor, this isn't going to be the first hearing where we walk in with one hand tied behind our backs.

THE COURT: Well, that is -- I can only just say that that is very unfortunate because, to the extent that there is a lot of public interest in these issues, that is the bottom line . . .” Tr. 33, lines 2-25; Tr. 34, lines 1-10.

9. These remarks, coupled with the fact that this ALJ has rarely, if ever, ruled against the government in his long career on the bench, indicates a personal bias. It is, however, a bias predicated on the ALJ's view of himself - a view that sees himself as a defender of the public interest, where the public interest is defined as carrying out the wishes of the government. That viewpoint causes the ALJ to regard licensees, e.g., Mitnick, who are charged with wrongdoing, as "bad guys"; he sees it as his duty to see to it that they do not continue to be licensees. Here, there is no reason to rush through this hearing. There is no evidence that Mitnick is using ham radio to carry out additional felonies; to the contrary, ham radio is one of the forms of communication which are permitted to Mitnick under the terms of his probation. Thus, this hearing could wait until after the ALJ's vacation in August, giving Mitnick an opportunity to round up additional character witnesses and to coordinate the notaries to allow those witnesses to be heard. Indeed, it might even be possible to obtain the agreement of the Enforcement Bureau to allow the testimony to be reduced to written form and notarized, so that a notary would not have to be physically present in the room.

⁴ However, because of the fixation of this ALJ on a particular hearing date, June 18, 2002, there is no opportunity to do any of this. Mitnick believes that fixation stems from personal bias.

⁴At least one of the witnesses proffered by Mitnick has already been extensively interviewed by two attorneys for the Enforcement Bureau; they know his voice; hence the requirement for a notary is entirely unnecessary. Given time, the same could be true of all of the witnesses.

Accordingly, Mitnick respectfully requests the ALJ to step aside in favor of another ALJ.

Respectfully submitted,

June 10, 2002

KEVIN DAVID MITNICK

Law Office of
LAUREN A. COLBY
10 E. Fourth Street
P.O. Box 113
Frederick, MD 21705-0113

By: 

Lauren A. Colby
His Attorney

A LEGENDARY HACKER REVEALS HOW TO GUARD AGAINST THE GRAVEST SECURITY RISK OF ALL—HUMAN NATURE

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DECLARATION

Kevin David Mitnick hereby declares under penalty of the laws of perjury that the following is true and correct:

I have carefully read the foregoing Motion to Disqualify Presiding Officer, prepared by legal counsel, and I adopt everything in that motion as my own reasons for requesting such disqualification.

Further declarant sayeth not.

KEVIN DAVID MITNICK

Dated: 6/10/2002

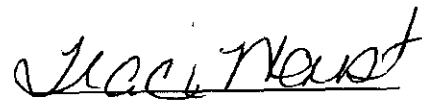
By: Larry Bratton

CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via facsimile and Federal Express, this 11th day of June, 2002, to the offices of the following:

Honorable Richard L. Sippel
Administrative Law Judge
F.C.C.
445 12th Street, S.W.
Room 1-C864
Washington, D.C. 20554

Charles Kelley, Esq.
James Shook, Esq.
Enforcement Bureau
Investigations/Hearing Division
F.C.C.
445 12th Street, S.W.
Room 3-B443
Washington, D.C. 20554


Traci Maust